United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1872 - ~~74-2154~~

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2154

SHOPMEN's LOCAL UNION NO. 455,
INTERNATIONAL ASSOCIATION OF BRIDGE,
STRUCTURAL AND ORNAMENTAL IRON WORKERS,
A.F.L. - C.I.O.,

Appellant-Appellee,

-against-

KEVIN STEEL PRODUCTS, INC.,

Appellee-Appellant,

-and-

NATIONAL LABOR RELATIONS BOARD,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF OF APPELLANT-APPELLEE, SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, A. F. L. - C. I. O.

SIPSER, WEINSTOCK, HARPER & DORN
Attorneys for Appellant-Appellee
380 Madison Avenue
New York, N.Y. 10017
(212) 867-2100

I. Philip Sipser
Belle Harper
Jerome Tauber
Of Counsel

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

OTHER AUTHORITIES CITED

Issues Presented for Review

1. Was the Court below correct in holding that the collective bargaining agreement between the parties was not an executory contract subject to rejection, within the meaning of §313(1) of the Bankruptcy Act (11 USC §713(1))?

2. If the collective bargaining agreement could be considered such a contract, did the Bankruptcy Judge in cancelling the same, fail to properly accommodate the rights and obligations of the parties under the National Labor Relations Act to those under the Bankruptcy Act? Did the Bankruptcy Judge in reaching its conclusion misstate the rights of employees involved?

3. If the collective bargaining agreement could be considered such a contract, did the Bankruptcy Judge use an improper limited criterion in holding that a contract is onerous if the Employer would be better able to compete in its area, if it weren't bound by the wages mandated in the agreement? And, did the Court below err in supporting the Bankruptcy Judge's finding and conclusion that the collective bargaining agreement was thus onerous?

4. If the collective bargaining agreement could be

considered such a contract, does the principle of equal treatment of classes under the Bankruptcy Act, permit the debtor to reject only its contract with the single union here involved, and to continue in effect its other collective bargaining agreements?

Statement

Kevin Steel Products Inc. (hereinafter, "Employer" or "Company") has appealed to this Court from an order of the District Court, per Whitman Knapp, D.J., dated August 1, 1974 which reversed a decision of Bankruptcy Judge Howard Schwartzberg, dated March 1, 1974 permitting the Company, as a debtor in possession in a Chapter XI proceeding, to reject the unexpired portion of its collective bargaining agreement with appellee Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (hereinafter "Local 455" or "Union").

This appeal is consolidated with a proceeding (Docket #74-1872) brought by the National Labor Relations Board (hereinafter"Board") against the Employer, seeking enforcement of an order of the Board dated March 8, 1974, finding the Company guilty of unfair labor practices in violation of §§8(a)(1),(3),

and (5)* of the National Labor Relations Act (hereinafter "Act"), and ordering remedial action including a direction that the Employer remedy the 8(a)(5) violation, by executing and giving effect to the collective bargaining contract which is the subject of this appeal.

The Board and the Company filed a joint motion for entry of Partial Consent Judgment in the enforcement proceeding, in which the Company agreed to the entry of a consent judgment by this Court, enforcing the Board's order with respect to the Company's violations under §8(a)(1) and (3) of the Act, and in which it further stipulated that it would not contest the Board's findings of fact and conclusions of law with respect to its violation of §8(a)(5). Insofar as the effect of the latter violation is dependent upon the outcome of the Company's appeal in the instant case, the Board and the Company agreed that its enforcement be held in abeyance pending determination hereof.

The Board's order and decision is made part of the record herein, and it will be freely referred to, having substantial relevance to the instant appeal.

---

* 29 USC 158(a)(1)(3) and (5)

Facts

The Employer is engaged in the fabrication and erection of structural steel, used in building construction. It commenced operations in about 1968. Shortly thereafter, Local 455 organized the Company's shopmen (62a).* The parties entered into a collective bargaining agreement and have been in collective relations and parties to collective agreements, since that time, except as set forth below. The number of shopmen has averaged approximately 15-20, over the years (10a).

The Employer has two other collective agreements - one covering its outside iron workers, and another covering its truck drivers (62a).

Relations between the Company and Local 455 deteriorated in early 1973. On February 15, 1973 the shop employees struck because of the Employer's failure to make contributions to the Local 455 Pension and Welfare Funds as required under the parties' agreement (10a, 49a). Such a strike was permissible under the parties' contract (160a). The Employer thereupon notified the strikers that they were being laid off for

---

* "a" refers to the Appendix herein, and the number preceding it, to the page

lack of work. On February 21, 1973 the Company made the required contributions and the Union announced the termination of the strike. The Company's President, Robert Palatnik, then advised the Union that the Company did not need any employees at that time, but would continue to operate with a single shop employee. This employee was kept on in violation of the contract's seniority provision (15a). On March 1, 1973, the Union's President, William Colavito, discussed the reasons for the layoffs with Palatnik, who insisted that he had no work and who added that even if he had work he would not recall the employees as long as employee Leggio remained the Union shop steward. On March 30, 1973, the Company notified the laid off employees that it was necessary "to permanently terminate them because there was no reasonable expectation of their being recalled" (10a-11a). The Company employed 15 shopmen prior to February 15, 1973.

The Union challenged the Company's failure to recall Leggio and the other strikers and the matter was submitted to arbitration. Other disputes between the parties also were submitted to arbitration. All were stayed by virtue of the Chapter XI proceedings.

On or about May 1, 1973, negotiations between the parties for a new contract to succeed the one expiring on June 1,

1973, commenced. "At this and subsequent meetings the main bone of contention was wage rates and the recall of Leggio" (11a, 20a). The parties finally worked out an agreement on May 21, 1973, whereby their previous contract was extended, pending negotiations of a new contract with other employers in the industry. They stipulated that the Company would adopt the contract to be reached with the other employers and the Union would not strike the Company during such negotiations, although other employers might be struck (20a). This agreement between the parties was reduced to writing, and the language thereof was approved by counsel. However, on June 5, 1973 the Employer's President, Palatnik, advised the Union President that he was disturbed by Leggio's conduct, and that the Company would not sign any agreement unless he was ousted as shop steward. When the Union indicated its willingness to consider a change, Palatnik stated he would not sign because of the high wage scale (22a).

The Union thereupon on July 11, 1973 filed unfair labor practice charges against the Company at the National Labor Relations Board charging that the Employer, in violation of §8(a)(5) of the Act, improperly refused to execute the contract agreed upon the parties. The Union further charged that the Employer had engaged in a series of other unfair labor practices prohibited by the Act.

Hearings were held before an Administrative Law Judge of the Board, on August 28 and 29, 1973, and he issued his findings and decision on November 21, 1973, in which he found that the Company had engaged in a series of unfair labor practices in violation of §§8(a)(1)(3) and (5) of the Act. He found that as early as 1972 "[R]espondent's president Palatnik offered the employees more liberal fringe benefits, if they would repudiate the Union; that the Company promised to make certain improvements in the existing retirement and hospitalization plans if the employees would defect from the Union; and that when one of the employees, who joined in the strike on February 15, returned to the plant for his pay, he was promised he would have plenty of work if he went "non-union". Accordingly, the Judge found that respondent violated §8(a)(1) of the Act (13a).

He further found that Palatnik would have recalled six or seven of the strikers on February 21, but for his opposition to Leggio, and that such opposition was due in large part, if not entirely, to Leggio's zeal in enforcing the Union's contract, and hence such failure to recall violated §8(a)(3) and (1) of the Act (19a).

Finally, it was found "that by June 1, the parties had reached agreement on the terms of an interim contract, but

respondent refused on and after that date, to execute a contract embodying those terms, thereby violating §8(a)(5) and (1)" (23a).

The Employer was accordingly ordered to cease and desist from its discriminatory conduct, from offering employees inducements to defect from the Union, from refusing to bargain in good faith with the Union by refusing upon request to sign the contract submitted by the Union on June 1, 1973, and from in any other manner interfering with or restraining or coercing its employees in their rights to join the Union or to bargain collectively (25a).

The Employer was directed affirmatively to: sign the contract submitted by it on June 1, 1973 and give effect thereto from July 1, 1973; to offer employees immediate reinstatement to their jobs, or if they no longer exist, to substantially equivalent jobs without prejudice to their seniority and other rights and privileges, and to post notices on the form supplied by the decision, informing employees of their rights (25a, 26a).

The decision of the Administrative Law Judge was adopted by the Board on March 8, 1974 (384a-386a).

The Company conceded that it has not to this date, complied with the Board's order in <u>any</u> respect.

Shortly after the hearings in the Board proceeding, but before the decision of the Administrative Law Judge was rendered, the Company filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. Upon the issuance of the decision and on December 17, 1973, the Employer applied to the Bankruptcy Court for an order permitting it to cancel and reject its agreement with the Union, which was the subject of the Board proceeding, alleging it to be executory and onerous.

At the hearing, the Employer's President testified that it had not complied with the contract. On the contrary, it had reduced wages, discontinued payments to the Pension and Welfare Plans covering its shop employees and otherwise reduced their benefits and lowered their working conditions (100a, 158a).

The Employer's President further testified that as of the date of its motion to cancel its agreement with Local 455 as onerous, and as late as the hearing date, it had no information as to the terms of said agreement and that it had not even seen a copy of the industry contract (83a). The Employer has made no application to cancel or reject the unexpired portions of its collective agreements with the other two locals, although concededly its outside erection employees earn more than its shopmen (125a). Also the Company testified that since July of 1973 it operated with only four shopmen. The Employer has made no

application to cancel any other contract it may have, other than the collective bargaining contract which is the subject of this appeal (115a, 160a, 163a).

As of the time of its motion and the date of the hearing, the Company presented no proposed plan of arrangement.

The Company's President merely testified at the hearing before the Bankruptcy Judge that it had discussions with people "regarding their interest in investing or lending money to Kevin Steel subsequent to September of 1973", and "the problem is that we have had Local 455 and the National Labor Relations Board and the court and we have had these proceedings and what not and they are just a little reluctant at this particular time to enter into any agreement with me if I am still under a Local 455 contract" (91a, 92a).

Palatnik was asked by his counsel, "if this Court were to set aside the Local 455 contract, would you be able to receive financing such that we could submit a plan of reorganization to this Court?" To which he made the following response: "I think these people would be in a position to look at us very favorably" (92a).

Palatnik further testified that if its contract with

Local 455 were not set aside he didn't "particularly think he could remain in business", as "well, right now I am able to do work, get work and make a profit. If I have to take Local 455's men, I have to increase my wage. . . . The local itself goes ahead and puts their men in, their shop stewards, their people and the control of our shop is lost" (83a).

When counsel for the Union asked for the names of the potential investors, this was denied to him, as "confidential". He, therefore, moved to strike such testimony and his motion was granted (94a-96a), leaving the record bare of any possible arrangement, but revealing the Employer's motivation.

Evidence as to the "onerous" burden of the collective bargaining contract with the Union was equally nebulous and indeed conflicting.

On direct examination, Palatnik testified that most of his work was in the upstate area, and that there were three to five shops which competed with him for jobs. He then identified two shops which "from what I understand" are organized by the Teamsters (69a) and three others which were non-union (69a,70a).

While Palatnik made a general statement that these shops paid less than he did, he gave no testimony as to their

rates. Nor did the Company produce any witnesses who had any knowledge thereof, to testify to the same. Nor was any other evidence produced with reference thereto.

The Union President then testified that all of the shops referred to, were small repair shops with few workers, some just family shops, and none of which would get large contracts (224a). None of this evidence was controverted.

The Employer, on the other hand, testified that the Company bid anything from $25,000 to $500,000 jobs (71a). In addition, Palatnik testified that the Employer bid against "a very very large spectrum of shops (70a, 106a), including shops in Pennsylvania, Massachusetts, Binghamton, Augusta, Maine, North Carolina, Long Island and New Jersey (70a, 106a, 112a). When he was asked whether the Company bid jobs that other companies which have contracts with Local 455 also bid on, he replied "I don't really know" (106a). And again, "to be honest with you, I don't know what shops [bid on jobs he bid on] because at the time they don't tell me who I am bidding against" (112a, 113a).

The evidence further disclosed that Local 455 had contracts with large shops in the same area as the Employer's plant (110a,111a) and that shops located in different areas,

bid and do work in the area where the Company is located (222a). Also, Union shops bid in other areas where in fact the Employer here also bids (22a). The Union contracts virtually all contain standard rates, except in some instances for the period of the initial contract with an employer. By the end of that first contract all rates and fringes are standardized (174a, 175a, 360a).

The only other evidence produced by the Company was the limited testimony of Mr. Palatnik concerning the Company's purported financial condition, and certain financial statements, none of which reveal the basic cause of its financial problems, or how they could be corrected.

Thus, initially, Mr. Palatnik testified that in 1971, the Company did approximately $1,200,000 worth of business; in 1972, approximately $1,500,000, and in 1973, approximately $1,400,000 (79a).

Palatnik then testified that in 1971, the Company made a profit of $16,800 - $17,000; in 1972 its profit was roughly $18,000 and in the first half of 1973, it lost $86,000 (80a).

On cross-examination, Palatnik changed his testimony, stating that for the fiscal year ending October 31, 1972 the

Company lost $86,000; and that the Company first became aware of that loss in January 1973 (129a, 130a); that for the fiscal year ending 1973, it had no figures and he did not know whether for that year the Company's profit or loss would be greater or lesser than for fiscal year 1972, or whether the Company lost any money at all (126a).

On cross-examination, it was further disclosed, that for the tax period ending October 31, 1972, the Company's tax return showed a closing inventory figure of $106,658.30 (Debtor's Ex. 1) 327a). However, a statement prepared by the Company's comptroller covering the following three month period ending January 31, 1973 showed a starting inventory of $210,078.57 (349a, 181a).

Palatnik stated that he did not know whether the said work sheet was accurate (183a). The Company produced no witness to testify to or explain the discrepancy between the two figures.

A certified public accountant, Bernard Werner, appeared as an expert witness on behalf of the Union. He testified that "in accounting for inventories, normally the opening inventory as of the beginning of the next period should be identical with the closing inventory for the preceding period. In this case,

there is a difference of nearly $104,000" (229a).

He further testified that the tax return showed a loss for the year ending October 31, 1972, but had the inventory of $210,078 (the stated inventory for the opening inventory on the comptroller's report for November 1, 1972) been substituted for the closing inventory on the tax return, the tax return would have shown a profit of approximately $18,000 for the year (230a).

Interestingly enough this figure coincides exactly with Palatnik's original testimony that the Company's profit for the year ending October 31, 1972 was "roughly $18,000" (80a).

Conversely, Werner testified that if the closing inventory as shown on Debtor's Exhibit "1" were substituted for the opening inventory on Respondent's Exhibit "A", there would have been a profit for the three month period of about $21,000, rather than a loss of approximately $83,000 (230a, 231a).

Palatnik said he could not explain the discrepancy and as indicated above, the Company produced no other evidence in connection with the Company's income for the period in question. Palatnik did testify that he had not filed a return for the period November 1, 1972 - October 31, 1973 (182a) and he had no knowledge of what the figures would show.

Palatnik further testified as to his salary for the years 1971 and 1972. He testified that in 1972 "I think it was around $15,000" (101a); and in 1971 "Oh, if I can remember rightly, $13,000, somewhere around there. I am not too sure. I would have to look at my records" (102a).

However, Debtor's Exhibits 1 and 3, and Respondent's Exhibit "A", produced at the request of the attorney for Local 455, disclosed the following salaries for Mr. Palatnik, for the periods in question: November 1, 1970 - October 31, 1971: $23,000; November 1, 1971 - October 31, 1972: $31,650; November 1, 1972 - January 31, 1973: $7,800 (or a yearly rate of approximately $31,000) (328, 241a, 347a, 350a).

The only other financial data testified to, was the following: that the Company had a loan from the Small Business Administration which had not been paid since March of 1973 and which was extended for a year (186a); the last time the Company paid for the lease on a Thomas Punch Machine was the previous August 187a); there is an application before the court to reclaim trucks rented by the Company, as the Company had not paid the $750 rental per month for the previous seven months (187a).

It should be noted, all of the above defaults occurred during the period when the Employer was operating without Union employees following the layoffs of February, 1973.

Although the Employer testified it could and did secure adequate help at below the contract rates, it had in fact only four employees during this period (plus two outside employees and one truck driver). Its previous complement of shopmen had been fifteen.

Against this, we have the testimony of Mr. Colavito that it is virtually impossible for any employer to secure the good skilled employees required by the Employer, if it is to have an efficient operation, if it paid rates below the prevailing union rates. He testified that the work, to be performed efficiently and competently, called for many years of experience and training, and that "a man who spends fifteen, twenty years in the industry or thirty-five years in the industry is not going to work for an employer at a lower rate and not get his fringe benefits like pension, welfare or anything else" (271a).

In argument before Bankruptcy Judge Schwartzberg, the following illuminating discussion appears at (303a):

> The Judge: "Well, you are throwing them out. You are not denuding them of their rights but you are throwing them out in the sense that you will have a non-union shop and they will be . . . there will be no one with whom you deal in connection with the operations of the Debtor in terms of vis-a-vis the Union.
>
> Mr. Craner: "But we are not abrogating whatever rights they have under the National Labor Relations Act.

"What we are saying to this Court and since this Court well knows, it has the authority if it wants to, if it seems. . . .

The Judge: "I understand, but I didn't want to let pass your remarks that you are not throwing them out. Because basically what you want to do is to be rid of the burden, as you say, of the Union obligation.

"You want to cast that off.

Mr. Craner: "Yes, but we can't cast off the Union.

"I mean, they are there, that's my point."

When challenged by the attorney for Local 455 that this meant getting rid of Local 455, Mr. Craner responded, "Economically, yes" (324a).

The Decision of the Bankruptcy Judge

The Bankruptcy Judge held the collective bargaining agreement between the parties to be executory within the meaning of §313(1) of the Bankruptcy Act; and further, that it imposed a burdensome and onerous obligation upon the Employer. Accordingly, he granted the Company's application to reject the unexpired portion of the contract and gave Local 455 and the Company's employees the right to file claims as creditors.

The Judge further held that lower labor cost "is a distinct advantage to the debtor" and therefore, a collective bargaining agreement which "compels a higher rate than the debtor

is currently paying leads this Court to the ineluctable finding that said contract constitutes a detriment to the debtor's competitive position in the industry and is, therefore, burdensome and onerous" (371a).

The Court also found no evidence that the debtor's motive was "mainly" aimed at contravening federal policy under the Act, as Local 455 remains the collective bargaining agent and has a right to file for damages. The Court noted, that since the strike on February 15, 1973 all the Employer's shop employees were not members of Local 455 and "therefore a rejection of the collective bargaining contract in question is not going to involve collectively bargained rights affecting any of the debtor's shopmen who were in its employ at the time of the filing of its Chapter XI petition or anytime thereafter" (372a). The Court noted too, that "according to the testimony of the debtor's president, the erstwhile Local 455 shopmen quit the Union in order to stay on the job with the debtor" (364a).

The Decision of the Court Below

The Court below reversed the order of the Bankruptcy Judge and held that collective bargaining agreements are not executory contracts subject to rejection, within the meaning of §313(1) of the Bankruptcy Act.

The Court discussed the significance of the provision of the Bankruptcy Act which immunizes Railway Labor Act collective bargaining agreements from its reach, and the provisions of the Act which specifically limit the method by which any collective bargaining agreement may be terminated, and commented that the "legislative history can probably be read as supporting any desired result. . . ." It then held:

> ". . . In the last analysis it seems more logical to assume that Congress intended to distinguish collective bargaining agreements as a class from all other contracts, than that it intended to make seemingly irrelevant distinctions between different kinds of labor agreements. Cf. John Wiley & Sons v. Livingston (1963) 375 U.S. 543, United Steelworkers v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574" (397-398a).

The Court then continued:

> "We accordingly do not reach the question of whether the bankruptcy judge erred in finding that because the debtor no longer has union members in its employ, no valuable rights would be jeopardized by the rejection of its contract with the Union" (398a).

The Court did, however, state its agreement with the Bankruptcy Judge that the contract involved was burdensome and onerous (395a).

POINT I

THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES IS NOT AN EXECUTORY CONTRACT WITHIN THE MEANING OF §313(1) OF THE BANKRUPTCY ACT.

This case presents to an appellate court, for the first time, the specific question of whether a collective bargaining agreement is an executory contract within the meaning of §313(1) of the Bankruptcy Act, 11 USC §713 (1).

Neither the Bankruptcy Court, nor the Court below engaged in any extended discussion of the law, and the decisional authority relating to the specific question is at best scant* and confined to decisions of lower courts. However, as we shall discuss below, appellate courts and the Supreme Court of the United States have had many occasions to pass upon the nature of the collective bargaining agreement in other contexts, and they have repeatedly refused to construe such agreements as commercial contracts or even as "contracts" in the strict sense of the term. Their development over the years, moreover, makes clear that collective bargaining agreements are certainly not at the present date, of an executory character.

---

*There are approximately a half dozen lower court decisions which considered the question, in over 40 years of the law's existence.

Judge Knapp in holding that the collective agreement is not encompassed within §313(1) of the Bankruptcy Act and that Congress could not have intended irrelevant distinctions between different kinds of collective bargaining agreements, refers to two decisions of the Supreme Court which emphasize the unique character of such agreements and to Congressional action which so treats them, i.e. John Wiley & Sons v. Livingston, (1963) 375 U.S. 543; and United Steelworkers v. Warrior & Gulf Navigation Co., (1960) 363 U.S. 574. Both decisions rely in large measure on legislation enacted subsequent to the Section of the Bankruptcy Act in issue, and will be discussed below.

In addition, innumerable articles by luminaries in the field have seriously challenged the antiquated concept that the collective agreement may be equated with the general commercial contract. We join with them in that challenge, in asking this Court to affirm the decision below.

As noted by Professor Corbin, a "collective bargain" is a "contract of a very special kind". (6A Corbin on Contracts §1420 at 343). And, as more graphically posed by Professor Clyde W. Summers:

> "The collective agreement differs as much from a common contract as Humpty-Dumpty differs from a common egg. The failure of the courts to see and remember the differences, causes confusion and leads them to blunder...." Summers, Judicial Review of Labor Arbitration or Alice Through the Looking Glass; 2 Buff. L. Rev. 1, 17-18 (1952).

Again, Summers states:

> "Contract rules which attempt to define with some specificity or detail, rights and duties of parties are largely useless and often misleading when applied to collective agreements." Collective Agreements and the Law of Contracts, Yale Law Journal, Vol. 78 No. 4, March 1969.

Other treatises by outstanding authorities in the field have likewise emphasized the differences between collective agreements and ordinary contracts. See e.g., Cox, The Nature of the Collective Bargaining Agreement, 57 Mich. L. Rev. 1 (1958); St. Antoine, Contract Enforcement and the Courts, 15 Lab. L.J. 583 (1964); Dean Shulman, "Reason, Contract and Law in Labor Relations", 68 Harv. L. Rev. 999, (1955); Chamberlain, Collective Bargaining and the Concept of Contract, 48 Colum. L. Rev. 829 (1948).

As we shall discuss in more detail below, "the Supreme Court has reechoed the litany that the 'collective agreement is not an ordinary contract', and that the substantive law should be fashioned 'from the policy of our national labor laws' not

simply from traditional contract law".*

For the collective agreement, although not a creature of, is most intimately affected by statutory provisions and policies, designed to protect the public and social interest in labor peace, and is otherwise laden with public policy and interest. And while it is an agreement, "it is not in any real sense the simple product of a consensual relationship", John Wiley & Sons v. Livingston, 376 U.S. 543 (1964).

The Labor Management Relations Act** establishes a framework within which the collective agreement is required to fit.

Section 7 of the National Labor Relations Act, 29 USC §157, articulates public policy that employees shall "have the right to...bargain collectively through representatives of their own choosing".

Section 9(a) of the Act builds upon that premise and sets forth the basic principle underlying collective bargaining

---

*Summers, Collective Agreements and the Law of Contracts.

**29 USC §141-197.

statutes and decisions predicated thereon, i.e. that a labor organization designated by a majority of the employees in an appropriate bargaining unit, becomes the exclusive representative of all employees in that unit. The bargaining relationship is then compulsory upon the employer and all individual employees. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944). The Employer is compelled to meet with the Union and bargain in good faith with it, with a view to reaching an agreement. NLRB v. Reed & Prince Mfg. Co., 205 F. 2d 131 (1953); 29 USC §158(d). If an agreement is reached, the Employer must be ready to put it in writing and sign the same, 29 USC §158(d). H. J. Heinz Co. v. NLRB, 311 U.S. 514 (1941). The individual employee is precluded from bargaining on his own behalf or through some other union, and he is bound by the agreement even when he is not a member of the union, and even when in fact, he may be bitterly opposed to both the Union, and the contract negotiated with it. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944). For it was determined by Congress and the courts that only by such a policy could labor peace be assured.

In the very early days of its growth, the labor agreement was described by the Supreme Court as a form of trade agreement or tariff. In J.I. Case Co. v. NLRB, supra, the Court stated:

The Employer was also found guilty of other unfair

> "Contract in labor law is a term the implications of which must be determined from the connection in which it appears. Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. Indeed, in some European countries, contrary to American practice, the terms of a collectively negotiated trade agreement are submitted to a government department and if approved become a governmental regulation ruling employment in the unit."

As the years progressed, the matters covered by these agreements, expanded and changed. The nature of that growth made it ever clearer that such contracts could no longer be made to fit within the mold of the simple executory contract. Increasingly, benefits were based on past service. Often they were payable out of pooled industry funds. It was only by such a mechanism, that increased benefits were possible.

Pension benefits, particularly, are often geared not only to length of service in a particular shop, but as in this case, to length of service in an industry. Moreover, they rest upon carefully calculated actuarial assumptions which must consider not only the age of an employee and length of service, but the length of the collective agreement and the contributions therein specified. Cancellation of a contract during its stated term may thus affect not only the pensions of employees in the particular shop, but others as well. Repeated cancellations may destroy the very funds themselves.

Welfare and other benefits are likewise commonly made through pooled industry funds. Contributions to such funds are, of course, part of the wage package. Should the contract be cancelled during its term, benefits are no longer payable, although the employee has already performed work in consideration for the medical, insurance and other benefits promised. Cancellation thus, unlike in an executory situation, deprives the employee of benefits already earned.

It should be noted and is of some interest in this connection, that Congress provided in §302(c)(5) of the LMRA (29 USC 186(c)(5), 1959), that contributions to such labor-management funds may be made only where a written agreement is in existence which sets forth the detailed basis upon which

under §77B of the Bankruptcy Act to set aside its collective

payments are to be made, so that employees may know and rely upon the same.

That section further provides for joint administration of such funds and for other guarantees to protect and secure the employees in their rights and benefits. More recently, in 1974, a law providing pension reforms was necessitated to further insure such benefits (The Employee Retirement Income Security Act of 1974, 29 USC 1001).

Numerous other benefits provided in the collective agreement are earned by past service. Vacations and sick leave normally fall within such provisions. Guarantees of tenure are most common. All would be lost upon cancellation of the agreement, although already earned. Few, if any, could be the subject of a claim in bankruptcy.

Stability in labor relations, thus has become a public necessity. This was recognized by Congress, when it enacted §8(d) of the Act, (29 USC 158(d). That section mandated the only circumstances under which collective contracts could be terminated, and the precise manner of such termination. No exception was provided for, in the event of a bankruptcy or

liquidation and extinction through bankruptcy or receivership proceedings * It was not intended and

reorganization. Nor should one be read into the law.*

Indeed, the Supreme Court has held, that even on proper termination of its contract, the employer may not unilaterally change any terms or conditions of employment of its employees, pending negotiations of a new agreement. Katz v. NLRB, 369 U.S. 736 (1962). A rule which we might note, the Employer here concedes it has violated, and continues to violate to this day.

Time witnessed further changes in the collective relationship and contract. An internal machinery was designed to handle the myriad disputes and unforeseen problems which arose between the parties. Congress again recognized this development and the need for its implementation as a positive factor in maintaining industrial peace. In 1959, protection of the integrity of collective bargaining agreements was declared to be national policy. Section 301(a) of the LMRA (29 USC §185(a)) was enacted to ensure their enforcement. And a new federal labor law was thus fashioned, with the help of and delination by the Courts.

* Appellant makes an artificial distinction between termination by the debtor employer, or on the application of the debtor employer. Also see §2(1) 29 USC 152(1) of the Act which makes Trustees and Receivers in Bankruptcy, Employers under the Act.

The nature of the collective agreement and how it might best be enforced so as to comport with such national labor policy was canvassed in Textile Workers Union of America v. Lincoln Mills, 353 U.S. 443 (1958). There the union brought a suit in the Federal Court under §301 to compel the employer to arbitrate a dispute in accordance with their collective agreement.

The court held that an agreement to arbitrate is the quid pro quo for an agreement not to strike, and that §301 "expressed federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained that way" (p. 455). The Court further declared (at p. 456):

> "It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common law rule, discussed in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 44 S. Ct. 274, 68 L Ed. 582, against enforcement of executory agreements to arbitrate...."(Emphasis supplied)

Thus, the concept that the collective agreement providing for arbitration as an executory contract, was rejected as antiquated, in light of the policies of our national labor laws.

The Court continued, that the Labor Management Relations Act,

> "...points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction, but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem..."(at 457).

The Supreme Court took a further step in delineating the nature of and obligations under collective agreements, in its famous Steelworkers trilogy.* Here again, it cast off traditional notions of the collective agreement as an ordinary contract, and reversed previous rulings which so treated them.

The question posed in those cases was whether under a broad arbitration clause, the court should direct arbitration of a dispute which on its face appeared baseless. In answering this question in the affirmative, the court expressly overruled previous decisions which held to the contrary** noting in American Manufacturing:

---

*United Steelworkers v. American Manufacturing, 363 U.S. 564
United Steelworkers v. Warrior & Gulf, 363 U.S. 574
United Steelworkers v. Enterprise, 363 U.S. 593

**International Association of Machinists v. Cutler Hammer, 271 A.D. 917, aff'd. 297 N.Y. 519

"...the lower courts in the instant case had a like preoccupation with ordinary contract law....

. . . . . .

"...In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose for which they intend to serve...." (p. 567).

In Warrior & Gulf, supra, the Supreme Court further elaborated on the difference between a common contract and the collective agreement:

"A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement...." (pp. 580-581)

In John Wiley & Sons v. Livingston, 376 U.S. 543 (1964) the Supreme Court reaffirmed and expanded the Steelworkers holding, stating:

"..While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract....Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstances...and by requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship...." (p. 550)

To adopt the simplistic and mechanical view of the Bankruptcy Court, properly rejected by the Court below, that a collective bargaining agreement is an executory contract capable of rejection on application of an employer in a Chapter XI proceeding, is to ignore the whole history of such agreements, and of the legislation, and court decisions interpreting the same and expressing public policy with relation thereto.

Appellant's argument rests in large measure upon the fact that the Bankruptcy Act (§77(n)(11 USC §205(n)) provides that wages and working conditions of railroad employees can only be changed in the manner prescribed in the Railway Labor Act, and is silent with reference to the wages and working conditions of other employees. It must be remembered, however, that when the cited provision was first enacted, the collective agreement was in its infancy and the National Labor Relations Act had not yet been born. Moreover, as indicated above, §8(d) which limited and prescribed the only manner by which collective bargaining agreements could be modified or terminated, was first enacted in 1947, and Congress provided no exceptions for employers in reorganization or bankruptcy. The Act moreover, decrees in §2(1), (29 USC §152(1)) that a trustee and receiver in bankruptcy is a "person" subject to its provisions, manifesting Congressional intent that the provisions of the Act are to be binding in bankruptcy proceedings.

To hold otherwise would be to set aside legislation designed to benefit the general public as well as the particular employer, union and employee, for the benefit of an individual employer. The employer might thus recoup his losses, but the losses of the union and the employees it represents could never be compensated by the filing of claims. Such a glaring inequity could but result in labor unrest, the very thing which Congress, for the general public good, stated it was determined to eliminate, by enacting the Labor-Management Relations Act. We submit that more precise legislation would be required to support such a conclusion.

Appellant contends that "[s]ince its enactment of the Railway Labor Act, 45 USC §161 et seq. Congress has intentionally differentiated between employees covered by the Railway Labor Act and general industrial employees".* In support thereof, appellant cites the House Report on the proposed NLRA in 1935, which noted that the proposed Act failed to contain a reciprocal provision that neither employer nor employee would interfere with the right of the other to designate its representatives, whereas the Railway Labor Act contained such a provision.** Interestingly enough, such a distinction was discarded as the law developed, and a reciprocal provision was in fact adopted in 1947. See §8(b)(1)(B), (29 USC §158(b)(1)(B)).

*Pg. 18 appellant's brief.

**Pg. 21 appellant's brief.

Again, appellant stresses Congressional concern with stabilizing the railway industry. But surely, Congress has manifested an equal concern for stability in the balance of industry. Thus it enacted 8(d), and §301 of the LMRA. And where could there be a more complex mediation or arbitration requirement than provided for hospitals and the medical care industry (§8(d),(g) NLRA, 29 USC §158(d),(g)). Congress came to realize and asserted the need for stability in all industrial relations. It was to this end that the Act and all of its amendments were addressed. Rather it is the position of the appellant which, if sustained, would catapult us back to industrial unrest and undo the careful work of Congress over the years.*

Appellant also cites previous decisions of lower courts concerning the statute in issue. Insofar as they held a labor agreement to be an executory contract within the purview of §313(1) of the Bankruptcy Act, we urge they were in error and were properly overruled by the Court below.

As noted by the Supreme Court in Boys Market, Inc. v. Retail Clerks' Union, 398 U.S. 235 (1970):

---

*Appellant makes other frivolous distinctions, such as differences contained in the provisions of the War Labor Disputes Act. In time of national emergency many distinctions were made between industries. Under the recent Wage Stabilizaton Act for example, it was necessary to make special provision for the food and health care industries. However, they are otherwise subject to the same law in the event of bankruptcy or reorganization.

"...We fully recognize that important policy considerations militate in favor of continuity and predictability in the law. Nevertheless, as Mr. Justice Frankfurther wrote for the Court '[S]tare decisis is a principle of policy and not a mechanical formula for adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience'...." (pp. 240-241)

POINT II

THE BANKRUPTCY JUDGE IMPROPERLY FAILED TO ACCOMMODATE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT, TO THOSE UNDER THE BANKRUPTCY ACT.

While appellee urges affirmance of the judgment of the Court below, we take issue with that Court on its finding that the contract in question was onerous. We also submit as an additional ground for affirmance, the failure of the Bankruptcy Judge to properly accommodate rights under the Bankruptcy Act to those under the LMRA. The Bankruptcy Judge further misstated and improperly evaluated the rights of the employees and the Union in reaching his erroneous decision. The Court below, in light of its determination that a collective bargaining agreement is not an executory contract within the coverage of §313 of the Bankruptcy Act, found it unnecessary to reach these questions.

That appellee has the right to urge these matters on this appeal, is no longer open to question. See United States v.

American Railway Express Co., 265 U.S. 425, 44 S. Ct. 560; Anderson v. Atherton, 302 U.S. 643, 58 S. Ct. 53; Cook v. Hirschberg, (C.A. 2d 1958), 258 F. 2d 56; Securities and Exchange Commission v. Fifth Avenue Coach Lines, (C.A. 2d 1970), 435 F. 2d 510.

Assuming arguendo, that the collective bargaining agreement between the parties could be considered as an executory contract, capable under the Bankruptcy Act of being rejected, nevertheless, on the present state of the record an accommodation between the two acts would have required a denial of such relief.

It is not unique that the terms of two statutes appear on the surface to confer conflicting rights or impose conflicting obligations. It is then incumbent upon the Court to carefully weigh the respective provisions, the policies underlying each, and all of the facts, to seek an accommodation of the two.

As noted in the dissent in Sinclair Refining Company v. Atkinson, 370 U.S. 195 (1962) subsequently adopted by the majority in Boys Markets, Inc. v. Retail Clerks' Union, 398 U.S. 235 (1970) concerning apparent conflicting mandates under §301 of the Labor Management Relations Act and §4 of the Norris-La Guardia Act, (at p. 216):

"...But the two provisions do coexist, and it is clear beyond dispute that they apply to the case before us in apparently conflicting senses. Our duty, therefore, is to seek out that accommodation of the two which will give the fullest possible effect to the central purposes of both. Since such an accommodation is possible, the Court's failure to follow that path leads it to a result - not justified by either the language or history of §301 - which is wholly at odds with our earlier handling of directly analogous situations, and which cannot be woven intelligibly into the broader fabric of related decisions."

And in its subsequent decision in the Boys Market case, supra, after stating that Sinclair set forth the correct principle on accommodation, the Court continued:

"The literal terms of §4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of §301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions [cases cited]." (p. 250)

The need for accommodation, was reiterated by this Court in its recent decision in New York Shipping Association, Inc. v. Federal Maritime Commission, 495 F. 2d 1215. The Court there observed:

"Justice Harlan [in Volkswagenwerk Aktingesellschaft v. FMC, 390 U.S. 261] made a second point in his concurring opinion that provides further aid in reconciling the competing labor and Shipping Act policies. Even though a particular agreement may be within Commission jurisdiction, he said 'Commission review itself must be circumscribed by the existence of labor problems that it is not equipped to resolve'....The Commission....should move with caution in areas of greater collective bargaining concern." (p. 1222)

See also, Nathanson v. NLRB, 344 U.S. 25, where the Supreme Court held:

> "The bankruptcy court normally supervises the liquidation of claims. See Gardner v. New Jersey, 329 U.S. 565, 573. But the rule is not inexorable. A sound discretion may indicate that a particular controversy should be remitted to another tribunal for litigation. See Thompson v. Magnolia Co., 309 U.S. 478, 483. And where the matter in controversy has been entrusted by Congress to an administrative agency, the bankruptcy court normally should stay its hand pending an administrative decision. That was our ruling in Smith v. Hoboken R. Co., 328 U.S. 123 and Thompson v. Texas M.R. Co., 328 U.S. 134, where we directed the reorganization court to await administrative rulings by the Interstate Commerce Commission before adjudicating the controversies before it. Like considerations are relevant here. It is the Board, not the referee in bankruptcy nor the court, that has been entrusted by Congress with authority to determine what measures will remedy the unfair labor practices. We think wise administration therefore demands that the bankruptcy court accommodate itself to the administrative process and refer to the Board the liquidation of the claim, giving the Board a reasonable time for its administrative determination." (p. 30)

Here, the need to accommodate provisions of the Bankruptcy Act to the subsequently enacted provisions of the National Labor Relations Act, is manifest. Equally manifest, is that no such accommodation was made or was even attempted, by the Bankruptcy Judge.

We are faced with an order of the National Labor Relations Board, (whose findings of fact and conclusions of law are conceded by the Employer), that the Company is guilty of unfair labor practices, because of its improper refusal to execute the very collective bargaining agreement, which it thereupon sought to reject in the Chapter XI proceeding.

The Employer was also found guilty of other unfair practices, since condeded, which are intimately connected to the Company's financial condition. Thus, the Board found that the Employer unlawfully laid off virtually all of its shop employees in February 1973, because of their concerted activity; and that it would have been able to provide work for some, but it did not do so for discriminatory reasons (15a, 19a). Obviously, such action seriously affected the Company's business and its financial situation. The Company was ordered by the Board to reinstate the laid off employees upon request.

Moreover, the Employer was found guilty of other discriminatory anti-union conduct, from which it was ordered to cease and desist.

Certainly, the Bankruptcy Court should not be used as a tool to collaterally attack the mandates of the Board. International Teamsters Quick Charge, Inc., 168 F. 2d 513. An accommodation between the two acts, should at the very least require that any application to the Bankruptcy Judge be made in good faith and that the Company be in no way motivated to contravene federal policy and law, and its obligations thereunder.

Against the background and findings of unfair labor practices by the administrative body with exclusive authority to make such findings, (San Diego Building Trades Council v. Garmon,

359 U.S. 236), it behooved the Bankruptcy Judge to act with the greatest of caution. Indeed, the decision of the Board plus the Employer's admitted continued violation of that decision and its collective bargaining agreement, created a presumption of bad faith which it was obliged to rebut. This would have required at the very least, the most comprehensive and precise documentation and proof of the Company's financial condition, a showing that the source of its financial difficulties, if any, was in fact the collective bargaining agreement; a proposed plan or a reasonable probability that it could successfully operate upon the granting of its application; a finding that the Company would gain no unfair advantage over its competitors by securing such relief; a weighing of all of the equities, including the rights of its employees and of the Union; that all creditors in the same or similar class will be similarly affected and treated; and finally that the Employer is not improperly motivated to any extent to rid itself of the Union or employees supporting it, and that their rights will be protected.

Indeed, in the few cases in which collective bargaining agreements were set aside (without any evidence of any unfair labor practice on the part of the employer), the courts recognized the delicate line they had to tread, and required standards of proof on the part of the applicant, singularly absent here.

In the very early case of In Re Mamie Conti Gowns, Inc., 12 F. Supp. 478, S.D.N.Y. (1935), the debtor filed a petition

under §77B of the Bankruptcy Act to set aside its collective bargaining agreement, alleging that its labor expenses were out of proportion to its volume of business. However, it failed to substantiate its claim with comparative figures. The Union, opposing the application, contended that its collective agreement produced stability in the industry, and moreover that the requested relief would give the debtor an unwarranted advantage over its competitors.

The Court denied the debtor's application, stating:

> "Considering the disproportion of assets over liabilities as stated in the debtor's petition, I am not wholly satisfied that this entire proceeding under Section 77B was begun to promulgate and consummate a plan of reorganization and not to discard, by order of a court, this particular contract.
>
> "Viewing the results of an opposite conclusion broadly, both as to employees in the dress industry and employers, competitors of the debtor and particularly its associated members of the Allied Manufacturers Association, and on all the facts before me relating to this individual manufacturer and its employees, I will deny the petition." (p. 480)

Thus, the Court was on guard against any possible misuse of the Bankruptcy Act and it was careful to weigh all the equities, even as the Court in International Brotherhood of Teamsters v. Quick Charge, Inc., 168 F. 2d 513 (1948), was to do, a decade later, when it warned, in a case requiring accommodation of the Bankruptcy Act to the Norris-LaGuardia Act:

> "The purpose of the Chandler Act was to afford companies in financial distress an opportunity to reorganize on a sound basis and thereby escape

> liquidation and extinction through bankruptcy or receivership proceedings.* It was not intended and may not be used as an avenue of escape by a company from the provisions of the Norris-LaGuardia Act in a labor dispute with its employees." (pp. 515-516)

Bankruptcy Judge Schwartzberg sought to distinguish the Mamie Conti Gown case from the one at bar, because "all of the debtor's employees were then members of the Union,...which is not the situation in this case". But here, the record discloses that the employees were not members, because of the Employer's violation of its collective bargaining agreement (the contract contained a union membership clause, and the Employer has improperly laid off its union members) and the National Labor Relations Act. Thus the Court was rewarding the Employer for its illegal acts.

Moreover, under the National Labor Relations Act, as well as the parties' contract, Local 455 represents all employees and they are entitled to all of the benefits of that representation and the collective bargaining agreement. In addition, even if the collective bargaining contract were set aside, the employees would be entitled to all of its benefits pending the negotiation of a new agreement, and the Employer could not unilaterally change those benefits, for to do so would be a violation of the National Labor

*Remington Bankruptcy, 1947 Edition Vol. II, ¶4461:

> "Good faith presupposes an honest intention to effect a reorganization together with a need for, and possibility of effecting it...[and that the provisions of the Act are not to be invoked] for an ulterior purpose."

Relations Act. Katz v. NLRB, 369 U.S. 736 (1962), and discussion in Point I. Further, as stated by the Court in Durand v. NLRB, 296 F. Supp. 1049 (1969):

> "In a bankruptcy case, the United States District Court, sitting as a court of bankruptcy, has exclusive jurisdiction of the bankrupt, and his estate for many purposes. However, Congress has not seen fit to insulate a receiver or trustee in bankruptcy from the jurisdiction of the NLRB as far as unfair labor practices are concerned. Section 10(a) of the National Labor Relations Act, 29 USCA §160(a) confers upon the Board the power to prevent 'any person' from engaging in unfair labor practices, and Section 2(1) of that Act, 29 USCA §152(1) expressly includes trustees in bankruptcy and receivers in its definition of 'person'." (p. 1055)

As a further purported distinction between the Mamie Conti Gown case and the one at bar, Judge Schwartzberg points out that the instant Employer's schedules reveal greater liabilities than assets. But the record contains no competent proof on this subject. Thus, the Employer submitted no figures for the period November 1, 1973 to the date of the hearing, and the Employer's president, its sole witness, claimed to have no knowledge of the same. Figures for earlier periods contained substantial inconsistencies and no testimony or other competent evidence was submitted to explain the discrepancies. Moreover, the Employer's president testified that he had no figures covering the cost and payroll of his shopmen.

A second case, referred to by the Bankruptcy Judge in his decision is In Re Overseas National Airways, 238 F. Supp. 359 E.D.N.Y. (1965). In that case, District Judge Rayfiel reversed

a finding of a Referee in Bankruptcy that collective bargaining agreements between the Employer airline and the unions were onerous and burdensome and should therefore be cancelled, on two grounds; first, that the agreements were covered by the Railway Labor Act which could only be changed in accordance with that Act; and second, that the Referee's finding were not supported by the evidence.

There, the Employer produced two witnesses. One testified that he had made a cost analysis of the Company's flight crews under its contract as compared to the cost of other supplemental carriers which he testified were 50% lower than the debtor's. The District Court rejected this testimony because the witness had failed to consider the type of aircraft flown, their capacity, weight, speed, etc. and because "the analysis was not based on an examination of the books and records of the Companies in question, nor was it supported by a true and adequate sampling of pilots' salaries."

In the present case there was no statement or documentary proof on what other employers paid, except for the statement of Mr. Colavito, the Union president, that virtually all of the 200 contracts which Local 455 had with employers in the industry were the same as the Employer's here. The Company, of course, produced no books or records of other companies for examination and the Company's president was hardly qualified even to make the general statements that he did, that some few small shops in his area, paid less.

The second witness in the Overseas case was the debtor's accountant who produced some figures, but the Court found that these too, "fail to truly and accurately establish the costs incurred by the debtor, allocable to the employees covered by the collective bargaining as here involved, for on cross-examination, he testified that the said figures represented the cost of the entire crew and not the pilots and stewardesses alone".

In the present case, no accountant or other person with knowledge of the Company's books or finances testified on the Company's behalf and the Employer's president who did testify, disclaimed any accurate knowledge of the same.

Even though the evidence submitted in the Overseas case was far more detailed and documented than in the present one, and even though there was no evidence of illegal practices by the employer there, the Court found the evidence "inadequate to support the Referee's finding that the agreements in question were onerous and burdensome and the Referee's finding to that effect, is therefore clearly erroneous". The Court concluded:

> "It seems to me, however, that the Bankruptcy Court when it has the power to reject a collective bargaining agreement, should do so only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor from its obligations under a collective bargaining agreement, it may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors." (Emphasis in original) (pp.361-362).

The Bankruptcy Judge sought to distinguish the above case on two grounds: first, that the Overseas case was governed by the Railway Labor Act, and "additionally, it should be noted this Court has found that a rejection of this debtor's collectively bargained contract is not going to involve collectively bargained rights affecting any of the debtor's shopmen who were in its employ at the time of the filing of its Chapter XI petition or at any time thereafter because ever since the strike on February 15, 1973, all of the debtor's shopmen were non-union workers".

As indicated above, this was clearly error. And by virtue of this basic mistake of law, the Bankruptcy Judge was led into the further error of failing to weigh the equities of the employees and the Union.

Judge Schwartzberg further relied on In Re Klaber Bros., Inc., 173 F. Supp. 83 (S.D.N.Y. 1959). We respectfully submit that there again he demonstrated his lack of expertise in labor matters and misstated or misunderstood the facts in that case. Thus he states:

> ". . . Judge Levet permitted the rejection of the collective bargaining contract, notwithstanding the fact that the union, as in the instant case, filed with the National Labor Relations Board a charge of unfair labor practice and refusal to bargain" (375a).

But, in the Klaber case, the Union, subsequent to the petition, filed "a charge of unfair labor practice based upon the application for the rejection of the contract. . . ." (Emphasis supplied) Moreover, in Klaber, the union representative testified to the injury to the Estate, if the contract were to be continued, and offered concessions.

It is abundantly clear that the Bankruptcy Judge failed to give the thorough scrutiny and careful balancing other courts required, in order to effect an accommodation between the dictates of two apparently conflicting statutes. Here, not only was no accommodation attempted, but the Court wrongfully encroached upon the area preempted by the Board, and fell into grevious error on the law and the facts.

Misunderstanding its role, the Court set a most limited and erroneous standard for its determination.

Thus the Court held:

> "All that matters is that it is apparent that the debtor would be better able to compete in its area if it were not bound by the mandated scale under the collective bargaining agreement." (368a)

He accordingly found that the contract was "burdensome".

We submit that any employer, obviously, can more

easily compete, if it pays less than its contract rate. But surely this cannot be the sole test of what constitutes an onerous collective bargaining agreement.

In addition, if the Employer intends to maintain only a crew of 3 to 4 shop employees, plus a truck driver, and 2 to 3 outside employees, who are covered by a collective bargaining agreement which concededly mandates rates above those required in the shopmen's contract, serious question is raised as to why the Employer seeks to reject only the contract with Local 455. We suggest that any reading of the record here with its long history of unlawful discrimination against the Union must provide ample explanation.

Indeed, under any circumstance, it would be improper for an employer to determine which unions and which of its employees should continue to enjoy collectively bargained rights and benefits, and which must suffer their loss. For equality of treatment of a class is a basic theme of the Bankruptcy Act Nathanson v. NLRB, 344 U.S. 25. Here, however, further caution was required in light of the decision of the Board and the employer's continuing pattern of anti-union activities. Strong proof of good faith was called for. None was forthcoming.

We do have the Bankruptcy Judge's conclusion, in

what was an apparent nod to the accommodation principle, that there is no evidence to support a finding that the debtor's motive "is mainly aimed at contravening federal policy of encouraging the creation and enforcement of collective bargaining agreement under the National Labor Relations Act" (Emphasis supplied). (371a)

But, if good faith is a necessary element in a reorganization and on an application to reject, (most particularly on the Employer's record here), the unlawful aim referred to should constitute no part of the Company's motivation; and the burden should have been placed upon the Employer to establish its complete freedom from such an unlawful objective. We submit that a reading of the record at hand could not support the clean hands required, but is replete with evidence which must lead to a directly contrary conclusion.

In addition, and as his last comment on the question of accommodation, Judge Schwartzberg states:

> "The privilege of obtaining the rejection relief provided under §313(1) of the Bankruptcy Act by those debtors who qualify does not clash with the aforesaid Federal policy because the financially distressed debtor is not absolved from all the consequences of the rejected contract. Local 455 remains as the certified bargaining agent and also has the right under §353 of the Act to file a claim for any damages that might have been occasioned by such rejection. It should also be noted that since the strike on

> February 15, 1973, all of the debtor's shopmen have been and are non-members of Local 455. Therefore, a rejection of the collective bargaining agreement in question is not going to involve collectively bargained rights affecting any of the debtor's shopmen who were in its employ at the time of the filing of its Chapter XI petition or at any time thereafter." (371a, 372a)

Initially, it should be noted that the Employer here, produced no competent evidence qualifying it for any relief.

We have already dealt with the Bankruptcy Judge's basic error of law concerning the rights of the employees, both members and non-members of the Union, to benefits collectively bargained on their behalf. In addition, here the discriminatory acts of the Employer were a direct cause of such non-membership, and should hardly inure to its benefit.

Moreover, the rights of the employees to file claims for damages could not realistically compensate them for their loss of valuable pension, welfare, seniority and other rights. It is equally apparent that the Union's losses are "incapable of forming the basis of a provable claim for money damages". In re Overseas National Airways, supra. We also respectfully refer the Court to the discussion by Judge Frankel, in National Maritime Union v. Commerce Tankers Corp., 325 F. Supp. 360,*

---

* Reversed on other grounds, 457 F. 2d 1127

on this subject, as most apt:

> ". . . . If the defendant may simply shuck off the vessel and the collective agreement, the position of the Union (and its members) can never be restored or be accurately compensated for in money terms. The companies have deemed that hurt fully curable by their offer of a bond to make up lost pension and welfare contributions should the Union ultimately win. That treats the Union as some sort of business devoted to the filling of its treasury and its 'funds'. Whether or not unions always cleave to their ideals, this is scarcely their nature or the measure of their legal rights. Omitted from the reckoning is the heart of the matter - the interest in 'the preservation of work' for its members, Intercontinental Container Tr. Corp. v. New York Ship. Ass'n., supra, 426 F. 2d at 887, as well as union power which the companies here do not even try to reckon in dollar terms.
>
> "On the other side of the coin, we have only the regrettable but unappealing sorrow of self-inflicted wounds." (p. 366)

Conclusion

The decision of the Court below reversing the Bankruptcy Judge's order should be affirmed.

Respectfully submitted,

SIPSER, WEINSTOCK, HARPER & DORN

By: Belle Harper
A Member of the Firm
Attorneys for Appellant-Appellee

I. Philip Sipser
Belle Harper
Jerome Tauber
Of Counsel

ADDENDUM

Section 8(d) NLRA, 29 USC 158(d):

"§158. Unfair labor practices

. . . . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification --

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

"(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days,

and the contract period of paragraph (4) of this sub-section shall be ninety days.

"(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

"(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute." (Emphasis in original)

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEILA FULLERTON, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 131 Lincoln Road, Brooklyn, New York.

That on the 10th day of February, 1975 deponent served two copies of the within brief of Appellant-Appellee by mail upon:

Abigail Cooley, Esq.
Assistant General Counsel for
Special Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20570

the address designated by said attorney for that purpose, by depositing true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Leila Fullerton

Sworn to before me this
10th day of February, 1975

Frances Adler

FRANCES ADLER
Commissioner of Deeds
City of New York 2-29
Certificate Filed in New York County
Commission Expires May 1, 1976

Section 8(g) NLRA, 29 USC 158(g):

"(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties."

2 Copies Received

Date RECEIVED FEB 11 1975

Firm GUAZZO, SILAGI & CRANER

By D. E. Flewelling

_____ Copies Received

Date _____

Firm _____

By _____